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Single Bench

IN THE HONOURABLE HIGH COURT OF JUDICATURE AT BILASPUR(C.G.)

Cr.A.No.695/2004

3/24/07

Filed on ....18/8/07.....
by Shri .....Advocate

R. to D.R. (J)
28/8/07

APPELLANT (IN JAIL) : Mohan @ Baisakhu S/o Bali Ram Yadav aged 35 years; R/o Village- Birkona, P.S. Koni, Distt. Bilaspur (C.G.)

VERSUS

RESPONDENT : State of Chhattisgarh Through- Police of P.S. Koni Distt. Bilaspur (C.G.)

CRIMINAL APPEAL U/S 374 (2) OF THE CODE OF CRIMINAL PROCEDURE.

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench: Hon'ble Shri DILIP RAOSAHEB DESHMUKH, J.

Criminal Appeal Number-695/2004

Mohan @ Baisakhu

Vs.

State of Chhattisgarh

Post for orders: 23.6.06

Sd/-
Dilip Raosaheb Deshmukh
Judge

Judgment Sheet

R/L

(R.N. JHA)

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench: Hon'ble Shri DILIP RAOSAHEB DESHMUKH, J.

Criminal Appeal Number-695/2004

Mohan @ Baisakhu

Vs.

State of Chhattisgarh

PRESENT: -

Shri R.N.Jha, learned counsel for the appellant.
Shri D.K.Gwalre, Deputy Govt. Advocate for the State.

J U D G M E N T

(Delivered on 23-06-2006)

This appeal is directed against the judgment dated 19-06-2004 delivered in Special Case No.34/2003 by Shri R.K.Rathi, Special Judge (Narcotic Drugs and Psychotropic Substances Act.), Bilaspur whereby the appellant was convicted under Section-20(B) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act. 1985 (hereinafter referred to as the "Act of 1985) and was sentenced to undergo rigorous imprisonment for 10 years and to a fine of Rs.1,00,000/- and in default of payment of fine to undergo additional rigorous imprisonment for 1 year.

2. Briefly stated the prosecution story is that on 20-10-2003 on receiving secret information that the appellant was in possession of huge quantity of ganja in his house at Village-Birkona, Sub Inspector S. S. Raj PW-7 after recording the said information vide Ex.P-3 and

informing his superiors vide Ex.P-1 proceeded to the spot with Sub Inspector H. Kerketta PW-6 and independent witnesses Raja Ram PW-3 and Rakesh Dubey. On reaching the house of appellant, Sub Inspector S. S. Raj PW-7 informed the appellant about his intention to search the house for possession of illicit ganja and obtained consent of the appellant vide Ex.P-4. After giving the search of his person as well as of the staff and witness vide Panchanama Ex.P-5, the house of the appellant was searched at 5.20 P.M. It was found that in one of the rooms on the *Patav* ganja was kept in 6 plastic bags. The recovered ganja was weighed by Nand Kumar Sahu at 5.25 P.M. and it was found to be 87 K.G. & 900 Grams. Two samples of 100 grams each were separated from each bag and were sealed. The remaining ganja in each plastic bag was also sealed. Seizure memo Ex.P-9 was prepared. Specimen impression of the seal was affixed on seizure memo and a separate panchnama of the specimen impression of the seal was also prepared vide Ex.P-14.

3. F.I.R. Ex.P-13 was written at 06.30 P.M. in Police Station-Koni by Sub Inspector Shri H. Kerketta PW-6. The 6 sealed plastic bags containing ganja and 12 sealed samples of 100 grams each were entrusted to Head Constable Malkhana Moharir Bandhu Bhaskar PW-5 on 20-10-2003 for safe custody which was entered into Malkhana Register Ex.P-12(C). On 28-10-2003, the 12 sealed sample packets were entrusted to Constable Kunj Bihari No.989 along with memo of Superintendent of Police Ex.P-18 for taking to the Forensic Science Laboratory, Raipur. The sealed sample packets were delivered on the same day at the Forensic Science Laboratory. Vide

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report Ex.P-19, it was opined that all the 12 sealed sample packets contained ganja. After completion of investigation, the appellant was prosecuted for the offence punishable under Section-20(B)(ii)(C) of the N.D.P.S. Act. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 7 witnesses. Relying upon the evidence led by the prosecution, the learned trial Judge convicted and sentenced the appellant as aforesaid in para-1. (Supra)

4. Shri R.N.Jha, learned counsel for the appellant has assailed the impugned judgment on the ground that the possibility of tampering with the samples sent to the Forensic Science Laboratory could not be ruled out since the specimen impression of the seal found on the sample packets which was drawn by the Forensic Science Laboratory in its report Ex.P-19 did not tally with the specimen impression of the seal affixed on Ex.P-9 & P-14. There was absolutely no evidence to show that the panchnama Ex.P-14 containing the specimen impression of the seal was sent to the Forensic Science Laboratory for comparison. The memo of the Superintendent of Police Ex.P-18 also did not show that the specimen impression of the seal was sent. It was urged that on these grounds alone, the appellant was entitled to be acquitted.

5. It was also contended by the learned counsel for the appellant that the independent witness Raja Ram PW-5 did not support the prosecution story. It was not established by the prosecution that ganja was recovered from the conscious possession of the appellant

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since Sub Inspector S.S.Raj PW-7 admitted in para-8 of his testimony that the wife and family members of the appellant also lived in the house. Another independent witness Rakesh Dubey on whose information the spot map relating to recovery of ganja from inside the house of the appellant was prepared was not examined by the prosecution for which an adverse inference ought to have been drawn against the prosecution. It was also pointed out that while Head Constable Bandhu Bhaskar PW-5 had stated that the seized contraband articles were delivered for safe custody in the Malkhana by Sub Inspector H. Kerketta PW-6, it was stated by Sub Inspector S.S.Raj PW-7 that he had delivered the contraband articles to the Malkhana Moharir. The Malkhana Register Ex.P-12(C) also did not show that the specimen impression of the seal was also entrusted for safe custody. Lastly, it was contended that there was a serious violation of Section-55 of the Act of 1985 in as much as there was no evidence to show that before entrusting the contraband articles for safe custody at the Malkhana, the Station House Officer had himself affixed his seal on all the articles. It was also pointed out that specimen impression of the seal affixed on Ex.P-9 & P-14 was a routine seal of the Police Station- University Thana, Koni whereas the entire seizure and search was conducted by Police Station-Koni. On these grounds, it was argued that the conviction and sentence awarded by the learned trial Judge deserves to be set aside.

6. Learned counsel for the appellant placed reliance on ***Kaniram Vs. State of Madhya Pradesh*** reported in ***2002 (2) Crimes-457, Jadumani Sahu Vs. State*** reported in ***1997(3) Crimes 486, Thandi***

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Ram Vs. State of Haryana reported in *(2000) 1 Supreme Court Cases 318* and *Jagdish Vs State of Madhya Pradesh* reported in *(2003) 9 Supreme Court Cases 159* in support of the above contentions.

7. On the other hand, Shri D.K.Gwalre, Deputy Govt. Advocate argued in support of the impugned judgment while contending that the evidence led by the prosecution created a presumption against the appellant relating to the possession of contraband ganja which was not rebutted by the appellant. It was also contended that the prosecution story could not be disbelieved merely because one of the Panch witness was declared hostile. Reliance was placed on *P.P.Fathima Vs. State of Kerala* reported in *2003(4) Crimes-390 (SC).*

8. Having heard rival contentions, I have perused the record of Special Case Number-34/2003. In a case under the Act of 1985, it is the duty of the prosecution to establish that the seals on the sample packets sent for chemical analysis to the Forensic Science Laboratory had remain intact till the samples were received in the Forensic Science Laboratory and that there was no possibility of their being tampered with. In the present case, the specimen impression of the seal contained in Ex.P-14 and Seizure memo Ex.P-9 do not match at all with the impression of the seal found on the sample packets by the Forensic Science Laboratory which has been drawn on the report Ex.P-19. The words "वि.वि." indicating Vishwa Vidyalaya, " म.प्र.पु." indicating Madhya Pradesh Police and the words

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म.प्र. written after the words Bilaspur are missing in the impression of the seal drawn by the Forensic Science Laboratory. Sub Inspector S. S. Raj PW-7 has not stated in his testimony that a specimen impression of the seal was sent to the Forensic Science laboratory along with the samples of contraband ganja. This is also not borne out from the memo of Superintendent of Police Ex.P-18. Copy of the Malkhana Register Ex.P-12(C) also does not show that the specimen impression of the seal used to seal the sample packets was also entrusted to the Malkhana Moharir. The testimony of Malkhana Moharir Bandhu Bhaskar PW-5 is also silent on this point.

9. It is also pertinent to note that there is material contradiction as to who had delivered the contraband ganja and the 12 sample packets for safe custody at the Malkhana. Head Constable Bandhu Bhaskar PW-5 stated that Sub Inspector H. Kerketta PW-6 had delivered the contraband articles at the Malkhana while H. Kerketta PW-6 did not make any such statement. Sub Inspector S.S.Raj PW-7 has in para-5 of his testimony stated on the other hand that he had delivered the seized contraband ganja and the sample packets to the Malkhana Moharir. Thus, a serious doubt is created as to who delivered the sample packets and the remaining plastic bags of contraband ganja for safe custody at the Malkhana.

10. There is no evidence on record to show compliance of Section-55 of the Act of 1985 which mandates that the Station House Officer of the concerned Police Station is duty bound to affix his seal on the seized contraband ganja as also the sealed sample

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packets before entrusting the same for safe custody at the Malkhana. As held in ***Thandi Ram Vs. State of Haryana*** reported in ***(2000) 1 Supreme Court Cases 318,*** non-compliance of Section-57 of the Act of 1985 renders the conviction of the appellant bad in law.

11. Having thus considered the evidence led by the prosecution, I am of the considered opinion that it cannot be ruled out that the samples sent for chemical analysis to the Forensic Science Laboratory had been tampered with.

12. It is also pertinent to note that Raja Ram PW-5 Independent witness of seizure did not support the prosecution story. The spot map Ex.P-16 shows that it was prepared by Patwari Rajendra Prasad Shukla on the basis of information given by independent witness Rakesh Dubey. However, neither Patwari Rajendra Prasad Shukla nor independent witness Rakesh Dubey was examined by the prosecution which creates a serious dent in the evidence of Shri S.S.Raj PW-7 relating to seizure of 87 K.G. & 900 Grams of ganja from the conscious possession of the appellant. It is also pertinent to note that although Sub Inspector S.S.Raj PW-7 had stated that Sub Inspector H. Kerketta PW-6 had accompanied to Village-Birkona and was present at the time of search and seizure in the house of the appellant. Sub Inspector H. Kerketta PW-6 did not depose about the search and seizure by Sub Inspector S. S. Raj PW-7. Sub Inspector S. S.Raj PW-7 had in para-8 of his testimony stated that the wife of the appellant and his 3 children also lived in the house of the appellant. Sub Inspector S.S.Raj PW-7 in para-7 of his testimony

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stated that he could not say as to how many rooms were there in the house of the appellant. In cross examination he has stated that the "*Patav*" from which ganja was seized was in the room which was immediately in front on entering the house. This is not borne out from the Spot map Ex.P-16 as the room is not situated in the front immediately on entering the house. It is also noteworthy that Sub Inspector S.S.Raj PW-7 has not given any explanation as to why any witness from Village-Birkona was not called at the time of search and seizure.

13. Thus, the following points emerge from the evidence led by the prosecution:

(A) The possibility that the samples of ganja sent for chemical analysis to the Forensic Science Laboratory had been tampered with, could not be ruled out.

(B) Independent witness Raja Ram PW-5 did not support the prosecution story. No witness of the locality at Birkona was called at the time of the alleged search and seizure.

(C) Another independent witness Rakesh Dubey at whose instance the spot map was prepared by Patwari, was not examined by the prosecution.

(D) Patwari, who prepared the spot map of the house of the appellant, was also not examined by the prosecution.

(E) There is total non-compliance of Section-55 of the Act of 1985.

(F) Sub Inspector H. Kerketta PW-6 did not corroborate the testimony of Sub Inspector S.S.Raj PW-7 relating to

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search and seizure of contraband Ganja from the house of the appellant.

(G) In view of the presence of family members of the appellant inside the house and the evidence of Sub Inspector S.S.Raj PW-7 contradicting the spot map Ex.P-16, it becomes doubtful that the contraband ganja was seized from the conscious possession of the appellant.

14. Having thus considered the evidence led by the prosecution in its entirety and the abovementioned points emerging therefrom, I am of the considered opinion that conviction of the appellant under Section-20(B) (ii) (C) of the Act of 1985 and the sentence awarded thereunder by the learned trial Judge deserves to be set aside.

15. In the result, the appeal is allowed. Conviction of the appellant under Section-20(B) (ii) (C) of the Act of 1985 and the sentence awarded thereunder by the learned trial Judge are set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case. Fine if paid, shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge

23 -06-2006